No. 06-479

In the Supreme Court of the United States

CENTER FOR BIO-ETHICAL REFORM, INC., et al.,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below correctly ruled that the Honolulu aerial advertising ordinance has not been preempted by federal law.

2. Whether the court below correctly ruled that Honolulu's content-neutral aerial advertising ordinance passes constitutional scrutiny under the First Amendment.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondents City and County of Honolulu, *et al.* (hereafter referred to as "the City") respectfully urge the Court to deny the writ of certiorari sought by petitioners in this case. The decision of the Court of Appeals for the Ninth Circuit has upheld Honolulu's aerial advertising ordinance in a careful opinion, 455 F.3d 910 (9th Cir. 2006), *reprinted in* Petition, Appendix B, at 4a-27a, which (1) affirmed its earlier decision (*Skysign Int'l, Inc. v. City and County of Honolulu,* 276 F.3d 1109 (9th Cir. 2002)) that Honolulu's ordinance has not been preempted by federal law and (2) also concluded that the ordinance is consistent with First Amendment requirements: "The Ordinance is a reasonable and viewpoint neutral restriction on speech in a nonpublic forum, and the banner towing prohibited by the Ordinance is neither a historically important form of communication nor speech that has unique identifying attributes for which there is no practical substitute." Petition at 5a, 455 F.3d at 915. The district court had also reached these same conclusions in a thoughtful opinion. 345 F.Supp. 2d 1123 (D.Hawaii 2004), *reprinted in* Petition, Appendix C, at 28a-56a. After the Ninth Circuit's ruling on May 23, 2006, Petitioners petitioned for rehearing and rehearing en banc. The petition for rehearing was denied, and the Ninth Circuit reissued its opinion on July 6, 2006, with minor modifications. No judge on the Ninth Circuit "requested a vote on whether to rehear the matter en banc," and therefore the petition for rehearing en banc was denied. Petition at 3a, 455 F.3d at 914.

In upholding the ordinance, the appellate court noted that Honolulu "has a long history of comprehensive regulatory oversight over its visual landscape, an effort designed to

protect the area's unique and widely renowned scenic resources," and emphasized that "in 1957, Honolulu was among the first municipalities to enact a comprehensive ordinance regulating signs." Petition at 5a, 455 F.3d at 914. In 1970, Honolulu enacted the predecessor to the present ordinance regulating aerial advertising, which is now codified at Sections 40-6.1-6.2 of the Revised Ordinances of Honolulu, as amended, *reprinted in* Petition, Appendix D, at 57a-58a. The appellate court quoted from the declaration of one of the City's experts who explained the importance of this ordinance by stating:

> looking out to sea from Waikiki Beach without commercial or promotional interruption is as crucial to the Hawaii visitor's and resident's experience as is the uninterrupted viewing of the canyon for travelers to the Grand Canyon...[F]ew things can damage the distinctive character of a scenic view faster than a large moving sign pulled through the center of the field of vision.

Petition at 6a, 455 F.3d at 915.

Petitioners, who seek to fly planes pulling banners 35-46 feet by 100 feet in size for five hours a day in front of public locations filled with people, Petition at 23 and 24 n.11, continue to argue that Honolulu's ordinance has been preempted by federal law and violates First Amendment standards, but they cite virtually no authority for these positions. They acknowledge that the most recent statement issued by the Federal Aviation Administration (FAA) explains that it does not understand the recent changes in FAA regulations "to preempt the Honolulu Ordinance." Petition at 8 (*citing* the July 2003 letter from the FAA's Deputy Chief Council, which is reprinted in full in Petition, Appendix H,

at 77a-80a). But Petitioners persist in asserting that a preemption situation exists, citing only a Colorado Supreme Court case (*Banner Adver., Inc. v. City of Boulder*, 868 P.2d 1077 (Colo. 1994)), whose reasoning had been viewed by the Ninth Circuit as inapplicable to Honolulu's ban on aerial advertising in its previous decision upholding Honolulu's regulation of aerial advertising. *Skysign Int'l, Inc. v. Honolulu*, 276 F.3d 1109, 1118 n.6 (9th Cir 2002). Petitioners also continue to assert that changes made to the FAA Handbook in December 2004 (after the district court's opinion had been filed) should be considered, but even if these changes were to be considered, they would not change the result, because these changes continue to make it clear that an FAA Certificate of Authorization "does not constitute a waiver of any State law or local ordinance." *See* Petitioner's Certificate of Authorization, Appendix E, at 60a. The appellate court's opinion explained that "the Center's Certificate contemplates the coexistence of local and federal law" and that the FAA has issued "no such affirmative regulations [that would] justify federal preemption." Petition at 13a, 455 F.3d at 918.

The appellate court explained that the airspace is a nonpublic forum and that the Honolulu ordinance is a reasonable viewpoint-neutral regulation appropriately designed to achieve the purposes of "preserving the economically vital scenic beauty of Honolulu and minimizing traffic safety hazards for motorists and pedestrians." Petition at 20a-21a, 455 F.3d at 922. The appellate court rejected the argument that Honolulu's ordinance foreclosed an entire medium of communication and excluded effective alternative forms of communication, quoting from *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949), where this Court explained that:

> That more people may be more easily and cheaply reached by [a particular means of communication], perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open.

The appellate court thus concluded that *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), was not relevant, explaining that "the Ordinance does not foreclose a unique and traditionally important mode of expression for which there is no practical substitute," because "[t]he Center has at its disposal a wide range of practical and effective means of communicating its message – from television to direct mail, email, leaflets, hand-held signs and old-fashion stumping, Hyde Park style." Petition at 26a, 455 F.3d at 923.

Petitioners have cited no new cases in their Petition for Certiorari to contest the rulings of the appellate court, but rather have repeated arguments that have been considered and rejected by both the district court and the appellate court. They have identified no conflict among the circuits on either of the issues they have raised. Their Petition for Certiorari should, therefore, be rejected by this Honorable Court.

REASONS FOR DENYING THE WRIT

I. THE APPELLATE COURT CORRECTLY APPLIED WELL-SETTLED LAW REGARDING PRE-EMPTION.

Petitioners rest their preemption argument on the contention that the Ninth Circuit's ruling is inconsistent with the 1994 decision of the Colorado Supreme Court in *Banner Advertising v. City of Boulder*, 868 P.2d 1077 (Colo. 1994), and is also inconsistent with their unique view of the positions taken by the Federal Aviation Administration (FAA). The Ninth Circuit explained in its *Skysign* opinion that the *Banner Advertising* facts were distinguishable from the facts relevant to Honolulu's aerial advertising ordinance, based in large part on a brief filed by the U.S. government in that case, which had pointed out factual differences between the two cases, and had also explained in some detail that the United States did not view Honolulu's ordinance as having been preempted by Congressional enactments and FAA regulations. 276 F.3d 1109, 1118 n.6 (D.Hawaii-2002). That position of the FAA was reaffirmed in the more recent letter written in July 2003 by the FAA's Deputy Counsel, which is attached to the Petition as Appendix H, pages 77a-80a. Petitioners acknowledge that the FAA has taken a position opposite of the one they assert, but they nonetheless present a convoluted argument that their view of FAA documents somehow supports preemption even though the FAA itself disagrees.

In *Skysign Int'l, Inc. v. Honolulu*, 276 F.3d 1109, 1116 (9th Cir. 2002), the Ninth Circuit concluded that nothing in the FAA's waiver system constituted express preemption and that the FAA's regulation of certain aspects of air traffic did not exclude local regulation of aerial advertising: "The 'mere volume and complexity' of the FAA's regulatory scheme do

not, without some affirmative accompanying indication, compel a conclusion that the agency has sought to occupy the field to the full." *Id.* at 1116 (*quoting from Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 718 (1985)). This decision explained that "advertising is an area traditionally subject to regulation under the states' police power, and we therefore presume that federal law does not displace Honolulu's regulatory authority over advertising *absent a clear statement of the federal intent to do so*, either by Congress or by the FAA as Congress's delegate." *Id.* at 1115 (emphasis added.)

When the Petitioners first filed this case against the City, they relied upon Notice N8700.16, issued by the FAA on October 7, 2002, which they included in the Petition as Appendix F, at 65a-67a. But this Notice expired by its own terms on October 7, 2003, *see* Petition at 65a, and the appellate court properly gave "the notice no weight because it self-expired on October 7, 2003, without any change in the FAA Handbook." Petition at 12a, 455 F.3d at 918.

Petitioners now rely upon amendments to Chapter 45 of the FAA's General Aviation Operation Inspector's Handbook which became effective on December 17, 2004, Petition, Appendix G, at 68a-76a, and the Certificate of Authorization reissued by the FAA to the Center on February 22, 2005, Petition, Appendix E, at 59a-64a, both of which emerged after the district court's opinion of November 8, 2004 and which are not part of the record of this case. The appellate court declined to take judicial notice of these documents, explaining that good reasons exist for refraining from considering "issues for the first time on appeal – the record has not been developed, the district court has not had an opportunity to consider the issue, and the parties' arguments

are not developed against the district court decision." Petition at 13a, 455 F.3d at 918 n.3.

Even if judicial notice were to be taken of these new documents, they would not warrant any change in the outcome, because these new FAA documents offered by Petitioners do not purport to preempt local regulations either explicitly or implicitly. The language in the amended Inspector's Handbook still explicitly recognizes that local ordinances may prohibit aerial advertising, and does not suggest that such prohibitions can be ignored: "The operator is responsible for acquiring knowledge of *State and local ordinances that may prohibit or restrict banner tow operations*." Inspector's Handbook, Chapter 45, Section 1, 5(B)(2), at 45-3, Petition at 73a (emphasis added). The Certificate of Authorization also retains the language in its "NOTE" that it has always previously contained, stating explicitly that: "This certificate constitutes a waiver of those Federal rules or regulations specifically referred to above. *It does not constitute a waiver of any State law or local ordinance*." Petition at 60a (emphasis added). Petitioners emphasize new language in the Inspector's Handbook stating that this language on the Certificate of Authorization is "boilerplate" without "legal effect" which constitutes "a disclaimer of responsibility by the FAA for the enforcement of State or local ordinances." Inspector's Handbook, Chapter 45, Section 1, 5(B)(2)(c), at 45-3, Petition at 74a. Whatever this language may mean, the language in the Certificate of Authorization's NOTE continues to make it clear that this FAA document "does not constitute a waiver of any State law or local ordinance," Petition at 60a, and so it is impossible to argue credibly that this Certificate and the revised Inspector's Handbook purport to preempt local ordinances such as Honolulu's aerial advertising ordinance. The Handbook continues to state explicitly that operators must contact each

new flight safety district they seek to operate in to learn "whatever special provisions...may be specific to that geographic area," Inspector's Handbook, Chapter 45, Section 1, 5(B)(3), at 45-3, Petition at 75a, and also explains that any questions concerning the meaning of the "NOTE" should be directed "to the Regional Counsel's Office." *Id.* at 5(B)(2)(c), Petition at 74a.

Petitioners' contentions regarding preemption are thus left without any probative support whatsoever. The Colorado state court decision in *Banner Advertising* has been carefully considered by the Ninth Circuit in *Skysign* and has been found to be inapplicable to the Honolulu situation, and it certainly cannot be argued that a state court decision would prevail over a federal appellate decision on a question of federal preemption. The new FAA documents relied upon by Petitioners are not part of the record in this case, but even if they were they would not change the outcome because they do not say what Petitioners wish that they would say.

II. THE APPELLATE COURT CORRECTLY APPLIED WELL-SETTLED FIRST AMENDMENT PRINCIPLES IN CONCLUDING THAT HONOLULU'S AERIAL ADVERTISING ORDINANCE IS CONSISTENT WITH THESE REQUIREMENTS.

The appellate court ruled that the airspace is a nonpublic forum, because it has not traditionally been used for assembly and the exchange of ideas and because access to this space has been "historically restricted." Petition at 15a, 455 F.3d at 919-20 (*citing Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992)). In *Lee*, this Honorable Court determined that an airport is *not* a public forum, emphasizing "the lateness with which the modern air terminal

has made its appearance" and the failure of operators of airport terminals to open these facilities to expressive activity. *Id.* at 680.

The appellate court rejected Petitioners' argument that the airspace should be classified as a designated public forum, explaining that this category applies only to situations "when the government has 'expressly dedicated the property for expressive conduct.'" Petition at 17a, 455 F.3d at 920 (*citing Preminger v. Principi*, 422 F.3d 815, 824 (9th Cir. 2005), and *Widmar v. Vincent*, 454 U.S. 263, 267 (1981)). The appellate court explained that the airspace "is the antithesis of an 'intentional [] opening [of] a nontraditional forum for public discourse," Petition at 17a (*quoting from Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)), and noted that "neither party cites a single example where expressive activity was sanctioned to occur in Honolulu's airspace" and that "Honolulu's airspace is not naturally compatible with expressive activity." Petition at 17a, 455 F.3d at 920.

In nonpublic forums, the appellate court explained, regulations are permitted if they are "(1) reasonable in light of the purpose served by the forum and (2) viewpoint neutral." Petition at 17a, 455 F.3d at 920 (*quoting from Brown v. Cal. Dep. of Transp.*, 321 F.3d 1217, 1222 (9th Cir. 2003) and from *Cornelius*, 473 U.S. at 806). Honolulu's aerial advertising ordinance is viewpoint neutral, the appellate court explained, even though it contains the "common sense" exception of allowing aerial vehicles to have "an identifying mark, trade name, trade insignia, or trademark on the exterior of an aircraft...if the displayed item is under the ownership or registration of the aircraft's or the airborne object's owner." Revised Ordinances of Honolulu, as amended, sec. 40-6.1(b)(1), *reprinted in* Petition at 18a, 455 F.3d at 921. The

appellate court explained that this exception "is a common sense one," Petition at 18a, 455 F.3d at 921, and was necessary because "the FAA is charged with prescribing regulations for identification of aircraft." *Id.* (*citing* 49 U.S.C. sec. 40103(b)(2)). As the appellate and district court both explained, Petitioners are permitted under the ordinance "to fly its own craft with identifying markings...to the extent permitted by federal law" even if its identifying mark were "Pro Life for America" or "Abortion Kills." Petition at 19a, 455 F.3d at 922; *see also* Petition at 53a, 345 F.Supp.2d at 1137. Because the ordinance is thus completely neutral toward all aerial vehicles, it "easily passes the hurdle of viewpoint neutrality." Petition at 19a, 455 F.3d at 922.

The appellate court explained that the ordinance was reasonable because it was well-suited to fulfilling "several legitimate needs, including preserving the economically vital scenic beauty of Honolulu and minimizing traffic safety hazards for motorists ~~and pedestrians~~." Petition at 20a-21a, 455 F.3d at 922. The appellate court agreed with the district court that "preservation of the visual beauty of Honolulu's coastal and scenic areas is of paramount importance," Petition at 21a, 455 F.3d at 922, and emphasized that this effort was crucial to protect "the state's most valuable and fragile economic asset – the natural beauty upon which Hawaii's tourism economy relies." *Id.* (*quoting from* 345 F.Supp.2d at 1134). This Honorable Court has recognized the importance of protecting and promoting aesthetics in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981) (where seven justices stated that a municipality's efforts to upgrade its appearance and promote traffic safety would

support legislation limiting or prohibiting billboards[1]), and in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984) (upholding a Los Angeles ordinance prohibiting signs on public property and explaining that the visual clutter of signs "constitutes a significant substantive evil within the City's power to prohibit").

Although the exemption for identifying marks does permit some potential visual distractions, the aesthetic impact is "speculative" and permissible under the reasonableness standard, particularly "given the FAA's plenary power over the airspace." Petition at 22a, 455 F.3d at 923. Also of importance was the appellate court's recognition that "nothing in this record supports any claim that the Ordinance was aimed at the Center or its message." *Id.* Indeed, Honolulu's aerial advertising ordinance was first enacted in 1970, long before any activities undertaken by Petitioners.

This Court has frequently upheld distinctions and exemptions among types of presentations and of media, so long as the distinctions or exemptions are not designed to suppress any specific idea or viewpoint. *See, e.g., Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (upholding a New York City ordinance that prohibited vehicles from advertising the products and services of others, but allowing the posting of "business notices upon business delivery vehicles, so long as such vehicles are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising"); *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981) (upholding the portion of the San

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[1] *See Metromedia*, 453 U.S. at 507-08, 510 (plurality); *id.* at 552 (Stevens, J., dissenting in part); *id.* at 559-61 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting).

Diego ordinance that allowed on-premises advertising but disallowed off-premises advertising); *Leathers v. Medlock,* 499 U.S. 439 (1991) (upholding an Arkansas law that exempted broadcast television from a tax imposed on cable and satellite television); *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946), and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946) (both upholding the Fair Labor Standards Act's exemption of smaller newspapers from costly burdens imposed on large newspapers); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (rejecting the argument that strict scrutiny review should apply to federal cable must-carry rules that imposed upon cable operators an obligation that advantaged broadcasters over cable programmers).

Finally, the appellate court rejected Petitioners' argument based on *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), that the aerial advertising ordinance violates the First Amendment because it forecloses an entire medium of communication. The appellate court explained that "[b]anner towing is neither a common means of speaking nor a distinct and traditionally important form of expression," and also that it does not provide "a unique ability to convey information about the speaker's identity." Petition at 24a, 455 F.3d at 924. *Ladue* protected the right to place expressive signs on one's own residential property because "the unique source identifying ability of a sign in front of an individual's home coupled with the fact that such signs are 'unusually cheap and convenient' made other channels of communication unacceptable." Petition at 25a, 455 F.3d at 924 (*quoting from Ladue*, 512 U.S. at 56-57). The appellate court explained that banner towing has no "unique source-identifying ability" and quoted from *Kovacs v. Cooper*, 366 U.S. 77, 88-89 (1949), for the proposition that "there is no constitutional right to engage in the cheapest, easiest, or most far-reaching form of

communication." Petition at 25a-26a, 455 F.3d at 924. This Court explained in *Kovacs* that just because "more people may be more easily and cheaply reached by [a particular means of communication]...is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open." 336 U.S. at 88-89. *Kovacs* ruled that municipalities can regulate the volume of a speaker in order to protect other community values, and could, in particular, prohibit "loud and raucous" amplifications in order to protect "the quiet and tranquility so desirable for city dwellers." 336 U.S. at 87. This Court has also explained that the Constitution "does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640, 647 (1981). The appellate court in the present case noted that Petitions have "ample and adequate alternative channels" for "communicating its message – from television to direct mail, email, leaflets, hand-held signs and old-fashion stumping, Hyde Park style." Petition at 26a, 455 F.3d at 925.

Petitioners challenge the conclusions of the appellate court by arguing that airspace should be characterized as a designated public forum, Petition at 15-18, but they do not cite one single case supporting that result. Petitioners emphasize the importance of the message they seek to convey, Petition at 18-20, but they make no serious attempt to argue with the appellate court's conclusion that ample alternative methods of communication are available to them. Petitioners contend that Honolulu's aerial advertising ordinance is content-based, Petition at 20-22, but they make no attempt to respond to the conclusions of the appellate and district courts that the ordinance (and its exception for identifying marks) is

content neutral because Petitioners would also be free to fly their own aerial vehicles with identifying marks.

Petitioners argue that Honolulu's aerial advertising ordinance forecloses an entire medium of expression in violation of *City of Ladue,* Petition at 22-26, but they fail to address the central underpinning of *Ladue* -- the unique source-identifying ability of residential signs -- which is completely lacking for tow banners. They emphasize the impact that would be presented by their banners, but make no attempt to address this Court's rulings in *Kovacs, Heffron,* and other cases that the First Amendment does not guarantee that each speaker will have the most effective mode of speaking.

III. THE DECISION BELOW PRESENTS NO CIRCUIT CONFLICT.

Petitioners make no contention that the ruling of the Ninth Circuit in this case is inconsistent with the rulings of any other circuit. In fact, the Ninth Circuit's opinion applies the tests developed by this Honorable Court in a sound and appropriate way to the facts of this case.

IV. CONCLUSION.

It is significant that throughout this litigation, Petitioners have never made any effort to challenge legitimacy of the purposes that underlie Honolulu's aerial advertising ordinance – to protect the outstanding visual beauty of Honolulu and thereby to protect the City's economic base which is anchored in the visitor industry, and also to reduce traffic accidents by reducing visual distractions. These content-neutral purposes are, in any event, amply justified and explained in the declarations of experts that were filed with the City's Motion

for Summary Judgment, and cited by the appellate and district courts. Petition at 6a, 455 F.3d at 915; Petition at 43a-47a, 345 F.Supp.2d at 1132-34.

The appellate court's opinion in this case utilized the tests developed by this Honorable Court and applied them carefully and accurately to the facts of this case. Because its opinion is sound in all respects, and because there is no split among the circuits regarding the issues raised in this case, this Petition for Certiorari should be rejected.

DATED: November 1, 2006.

Respectfully submitted,

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